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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 378

LEO SHAFFER, JULES HORWICK AND EDGAR M. WYATT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Southern District of Indiana, Terre Haute Division, was entered on September 10, 1959, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming the said judgment, was filed June 13, 1961, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On August 2, 1961, the Court of Appeals denied the Petition for Rehearing (this order appears in the Appendix of this Petition). This Petition is filed within thirty days of the denial of the said Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where the Internal Revenue laws provide that a co-partnership engaged in the business of accepting wagers, doing business in one location, shall be required to pay but one special tax, and where the indictment charges the defendants with engaging in said business as co-partners of a wagering syndicate located at Terre Haute, Indiana, is not the Government required to prove the existence of the specific partnership charged in the indictment beyond a reasonable doubt?

2. Where the Internal Revenue Code of 1954 defines a partnership to include a syndicate, group, pool, joint venture or other unincorporated organization and that any number of persons doing business in co-partnership in any one place shall be required to pay but one special tax, and where the indictment charges that the defendants are engaged in the business of accepting wagers as co-partners in a wagering syndicate, is it not error for the court to instruct the jury that they may find *any* defendant individually guilty of the charges in the indictment, and

that any of the said defendants may be found guilty if he was an aider and abettor?

3. Where the regulations of the Commissioner of Internal Revenue provide that a partnership engaged in the business of accepting wagers shall file an application for a stamp tax, Form 11-C, and Excise Tax Returns, Form 730, with the Collector of Internal Revenue in the district in which its principal place of business is located, is it not error to introduce evidence that certain respective defendants comprising the partnership did not file the application or the returns in their respective cities of residence which were other than the location of the principal place of business of the partnership, and in Baltimore, Maryland?

4. Where the Government introduced testimony that certain respective defendants did not file the aforesaid Forms 11-C and 730 in their respective cities of residence, which were other than those within the District of Indianapolis, Indiana, and in Baltimore, Maryland, were not the jurors informed that the defendants committed other crimes with which they are not charged in the indictment in their respective cities of residence and in Baltimore, Maryland?

5. Whether the constant use of the phrase "and/or" in the instructions did not render them unintelligible and confusing to the jury.

6. Whether it was not error to permit Government witness Glen Johnson to answer hypothetical questions containing ultimate facts to be determined by the jury, and conclusions and facts not in evidence.

STATEMENT OF THE CASE.

The Petitioners were convicted, together with defendants Philip Share, Irwin Gordon, James Tamer, Joseph Jacobson and Charles L. Sumner, of violation of Title 18, U. S. C., Section 371, and of Title 26, U. S. C., Section 7201 and 7203, in a trial by the court and a jury, in the United States District Court, Southern District of Indiana, Terre Haute Division.

The jury found all of the defendants guilty as charged in the indictment (D. App. 15).* Each of the defendants was sentenced to serve a term of imprisonment of four years on Counts I, II, III and IV, to run concurrently and to serve a term of one year on Count V, to run consecutively with Counts I, II, III and IV; the sentences of the defendants Joseph Jacobson and Charles L. Sumner were suspended and they were placed on probation for five years. This Petition is filed by the defendants Leo Shaffer, Jules Horwick and Edgar M. Wyatt.

Count I charged that all the aforesaid defendants, on or about September 1, 1957, did feloniously conspire to wilfully attempt to evade and defeat a large part of the excise tax on wagers as provided for by Section 4401, Internal Revenue Code of 1954, for the months of September, October and November, 1957. It further alleged that the said defendants *engaged in the business of accepting wagers as co-partners in a wagering syndicate* at Terre Haute, Indiana. It charged that the object of the conspiracy was to be accomplished by concealing the existence of the said wagering syndicate and co-partnership; concealing the identities of the said co-partners; concealing

* Appellants filed a two volume Appendix and Appellee filed a three volume Additional Appendix and a book of exhibits. Petitioners, through this Petition refer to their Appendix as "D. App." and to the Government's Additional Appendix as "P. App."

the names of the persons placing wagers by destroying wagering slips; by maintaining false books and records with reference to the amount of the wagers; by engaging in the business of accepting wagers *as co-partners*, without first having paid the special Occupational Tax imposed by Section 4411; by failing to register with the District Director of Internal Revenue at Indianapolis as required by Section 4412 of the said Code; and by failing to file the Wagering Excise Return to the said officer "or to any *other proper* officer of the United States," *and by failing to pay the Wagering Excise Tax due for the months of September, October and November, 1957* (D. App. 23).

Fifteen overt acts were alleged for the purpose of carrying the said conspiracy into effect.

Count II charged that during September, 1957, the aforesaid defendants were engaged in the business of accepting wagers as co-partners in a wagering syndicate located at Terre Haute, Indiana and that during said month the defendants accepted wagers in the amount of $326,315.20, more or less subject to a 10% excise tax; that the defendants *as co-partners* owed an excise tax in the amount of $32,631.52, more or less; that *as co-partners* the defendants were required by law to file a return with the District Director of Internal Revenue at Indianapolis, Indiana, and to pay the said excise tax; that they did wilfully attempt to evade and defeat the said excise tax due on October 31, 1957 by failing to file a wagering excise tax with the said District Director or to any other *proper* officer of the United States; and by failing to pay the said District Director or any other proper officer of the United States the excise tax due; and by concealing and misleading all *proper* officers of the United States as to the correct amount of wagers during September, 1957; and by concealing the existence of their wagering business; and by concealing the identities of the said co-partners;

and by maintaining false books and records of the taxable wagers received by the defendants; and by destroying wagering slips indicating the identities of persons placing wagers of the said wagering syndicate and the gross amount of such wagers (D. App. 23-24).

Counts III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00 respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U. S. C. A. § 7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954 (D. App. 25-28).

The defendants, including the Petitioners, moved for an indefinite continuance because of alleged and prejudicial newspaper and television publicity (D. App. 87-90) and also to transfer the proceedings to another district, incorporating by reference in the latter motion all that the defendants set forth in the motion for an indefinite continuance (D. App. 90).

EVIDENCE.

Internal Revenue Agents Homer H. Forrester, at Reno, Nevada (D. App. 257-260), John A. Wheeler, at Chicago, Illinois (D. App. 260-263), Anthony Stapke, at Los Angeles (D. App. 262-263), Imogene Barlow, at Detroit (D. App. 264-265), and Joseph J. Marchioni at Baltimore, testified (D. App. 266-267) that Irwin Gordon and Philip Share did not file Registry-Wagering Form 11-C and Form 30 in the office of the Internal Revenue Service in Reno, Nevada; that neither Shaffer nor Jules Horwick filed similar documents in the District Director's office at Chicago, Illinois; that Philip Share did not file similar documents at the

office of the District Director of Internal Revenue at Los Angeles; that James Tamer did not file these documents in the office of the Internal Revenue Service in Detroit; and that none of the said defendants filed any of these documents, respectively, in the office of the Internal Revenue Service in Baltimore.

Delbert Paul Hopkins, the Assistant Chief of the Collection Division of Internal Revenue Service located at Indianapolis, Indiana, over objection, testified that he found no records in his office that Leo Shaffer had filed an Application for Registry-Wagering, Form 11-C (D. App. 221); that defendant Jules Horwick did not file a similar application (D. App. 221), nor did defendant James Tamer (D. App. 222), nor did defendant Joseph Jacobson (D. App. 222), nor did defendant Charles L. Summer (D. App. 222-223), nor did defendant Irwin Gordon (D. App. 226), nor did defendant Philip Share (D. App. 223). He further testified that the records in his office indicated that the said defendants did not file a monthly Wagering Excise Tax Return, Form 730, for the months of September, October and November, 1957 (D. App. 223-232). E. M. Wyatt and Company and Wyatt Service Company, neither of which firms was indicted, did not file Form 11-C nor 730 (D. App. 234-235). There was no record that Wyatt & Shaffer filed an application for Registry-Wagering, nor any wagering tax returns (D. App. 235-236).

Defendant E. M. Wyatt, however, filed Form 11-C, the Application for Registry-Wagering, for the period of September 12, to June 30, 1958, in the office of the District Director at Indianapolis, Indiana (D. App. 238). He also filed Form 730 for the months of September 1957, October 1957 and November 1957—Government's Exhibits 2, 3 and 4 (Book of Exhibits).

There was no testimony or evidence that the defendants, Leo Shaffer, Jules Horwick, Philip Share, Irwin Gordon,

Joseph Jacobson, James Tamer, Charles L. Sumner and Edgar M. Wyatt, as co-partners in a wagering syndicate at Terre Haute, Indiana, as charged in the indictment, failed to file the aforesaid forms 11-C and 730 in the office of the Internal Revenue Service located at Indianapolis, Indiana.

Government witnesses testified that defendant Wyatt leased third floor premises at 671½ Wabash Avenue, Terre Haute, Indiana, from Joseph Traum, the owenr of a residence at 673 Wabash Avenue, at a rent of $1,000.00 for the period of September 1, 1957 to December 31, 1957 (D. App. 396-401). Wyatt told Traum that he wanted to rent this space to put in a sports service (D. App. 403-404). Wyatt applied on September 9, 1957, to the Western Union Telegraph office in Terre Haute for sports service (D. App. 407), and this service was installed at 671½ Wabash Avenue.

Wyatt applied for telephone service for the premises (D. App. 314-321) and deposited $5,000.00 for the guarantee of payment of charges, to cover long distance calls (D. App. 321-322).

Wyatt reserved rooms at a Terre Haute hotel for Shaffer and Jacobson (D. App. 366, 375) and they registered at such hotel on September 13, 1957. On the same date Horwick and Tamer registered in Terre Haute hotels (D. App. 376, 371-373, 375, 389).

Government witness Kaplan, a resident of Chicago, Illinois, testified that he sold sports service, which was the making of handicaps or betting odds on sports events (D. App. 1149).

Shaffer arranged for this sports service (D. App. 1160) to be sent to sixty-two clients of defendant Shaffer, two sheets weekly, by mail. He always had that list of Shaffer's clients. These mailings were made from Address-O-Graph

machine plates (D. App. 1163) and they were returned to someone on or about December 1, 1957 (D. App. 1164). Mr. Kaplan couldn't remember whether this someone else was Mr. Shaffer, but it could have been he. This testimony, by order of court, was confined only to Mr. Shaffer (D. App. 1156). He was paid for this service by the check of Wyatt & Company (D. App. 1169).

Defendant Horwick ordered about 110 sheets per week. His office addressed the envelopes and would insert the information therein; they were picked up by Mr. Horwick's man in Kaplan's office in Chicago (D. App. 1172-1173). Shaffer and Horwick were the only two defendants who purchased this service. Kaplan furnished service to them for a long time prior to September, 1957.

Mail was received from customers at 671½ Wabash Avenue (D. App. 450-451) and at the Manor House Restaurant (D. App. 537-542). The letters indicated that the forwarded money enclosed therein was to go to either Shaffer or Horwick (D. App. 938-984). Wyatt and Shaffer paid the porter (D. App. 561-562, 565-566).

A large number of witnesses testified that they placed bets over the telephone located at 671½ Wabash Avenue.

R. B. Key (D. App. 848-850), Samuel A. Fenberg (D. App. 901-906), David Shaer (D. App. 915-922), Joseph Fleischer (D. App. 923-928), Henry De Jong (D. App. 928-932), James Star (D. App. 940-942), Edward Thornwell (D. App. 944-945), Sam Beil (D. App. 967-970), Ned Blaz (D. App. 986-988), Aleck Ostrow (D. App. 988-991), Gordon Scherck (D. App. 922-996), Gene Purdy (D. App. 1000-1002), Sam K. Viersen, Jr. (D. App. 1003-1009), Paul Warren (D. App. 1013-1014), Tim Shaner (D. App. 1016-1017), Isadore Shapiro (D. App. 1018-1025), George Polo (D. App. 1032-1038), Irving Pasternak (D. App. 1041-1043), C. H. Dresser (D. App. 1053-1057), Gerard F. Re (D. App. 1068-1074), Ben-

jamin McKeage (D. App. 1080-1083), B. H. Kean (D. App. 1116), Fannie Zorensky (D. App. 1118-1122), A. Ben Chadwell (D. App. 1141-1146), Joseph Vinocur (D. App. 1206-1209), Sol Lippman (D. App. 1209-1211), F. William Harder (D. App. 1235-1237), Jack Leonard (D. App. 1247-1248), John R. Crawford (D. App. 1276-1277), and Irving Weisman (D. App. 1277-1278), all testified that they made bets with the Defendant Horwick, either by that name or by the name of Jules or Julie. In almost each instance they testified that they expected to be paid by Horwick and no one else in the event they won bets and that they expected to pay Horwick and no one else in the event they lost bets.

John H. Judd (D. App. 850-855), Neville Alfrey (D. App. 937-940), Harry Joseph (D. App. 970-972), Beldon A. Kattleman (D. App. 972-975), Arthur Summerfeld (D. App. 976-980), K. Barney Levine (D. App. 980-986), John Joseph (D. App. 1014-1016), William Hecht (D. App. 1029-1032), Sherman Sharwell (D. App. 1046-1052), David Gensburg (D. App. 1129-1140), Walter Gray (D. App. 1147-1148), Sam Rodder (D. App. 1186-1190), Frank Scoby (D. App. 1192-1196) and C. C. Parker (D. App. 1197-1204) all testified that they made wagers with the Defendant Leo Shaffer. In almost each instance the witness testified that if he won a bet he expected to be paid by Shaffer and if he lost he expected to pay Shaffer.

Zeppo Marx (D. App. 863-868), testified he made bets with Philip Share.

Theodore Wender (D. App. 868-874) testified that he made bets with either Philip Share or Jules (Horwick).

Michael Shapiro (D. App. 1123-1125) testified that on a few occasions he made a bet with Mr. Share; and Sam Segal (D. App. 1125-1129) testified that he asked for Mr. Share but never got to talk to him; he therefore made wagers with someone he didn't know.

Julius Gaines (D. App. 840-847) testified that he made bets with "Flippy" Share or Leo Shaffer. Max Stein also testified that he made wagers with "Flippy" Share or Leo Shaffer (D. App. 874-875).

Jack Lieberman (D. App. 912-915) didn't know the name of the person with whom he made a wager. Earl A. Jeffors (D. App. 855-860) didn't know the name of the person with whom he bet; and neither did John C. Tyler (D. App. 942-944).

Julius Fischman (D. App. 1010-1012) only did business with someone whom he knew as "Frank".

A Government witness, Glen Johnson, was asked a number of hypothetical questions for the purpose of determining the total tax due by the co-partners and in a number of questions asked for that purpose he was requested to assume that the amounts in Government's Exhibit 137 represent *amounts due to the defendants as co-partners of a wagering syndicate* from various bettors (D. App. 1289, 1292, 1296-1297, 1299, 1302, 1303-1304, 1308, 1309-1310). Objections were made to the questions (D. App. 1290, 1294-1295, 1300, 1302-1304, 1309-1311). These objections were overruled (D. App. 1291, 1296, 1300, 1302-1304, 1309-1311).

Mr. Johnson answered that the total amounts receivable or due the defendants as co-partners for September, October and November, 1957, was $116,212.00 (D. App. 1292-1293). The total amount of gross wagers accepted by the defendants as co-partners on football games played November 29, 1957 (D. App. 1294), was $327,760.00 (D. App. 1296). The total amount of wagers accepted by the defendants as co-partners on football games *that were not played* as of November 29, 1957 (D. App. 1297) was $930,777.00 (D. App. 1298). The total amount of gross wagers received by the defendants as co-partners on the post season ball games *to be played* on January 1, 1958, but received prior

to November 29, 1957 (D. App. 1299), was $136,100.00 (D. App. 1302). The total amount of wagers with the defendants as co-partners in September, October and November of 1957 (D. App. 1303) was $2,895,231.00 (D. App. 1305). The total amount of wagers accepted for Thursday, November 28, 1957 was $355,525.00 (D. App. 1309). The wagers accepted for games played on November 30, 1957, and December 1, 1957, was $636,400.00 (D. App. 1309-1310). For Sunday, December 1, 1957, the total was $145,600.00 (D. App. 1310-1311). The total amount of wagers was $1,844,707.00 accepted by the co-partners on the assumptions appearing in the questions put to the witness Glen Johnson that the defendants were co-partners in a wagering syndicate.

Handwriting experts placed upon the stand by the Government testified that 31 of the wagering tickets found on the premises at 671½ Wabash Avenue were in the handwriting of Irwin Gordon (D. App. 1339-1340, 1383-1384); that 96 were in the handwriting of Charles L. Sumner (D. App. 1345-1348, 1386-1387); that 3 were in the handwriting of Joseph Jacobson (D. App. 1350, 1387-1388); that 10 were in the handwriting of James Tamer (D. App. 1353-1355, 1384); that 26 were in the handwriting of Edgar M. Wyatt (D. App. 1368-1369, 1390-1391); that 111 were in the handwriting of Jules Horwick (D. App. 1357-1358, 1389-1390); that 85 were in the handwriting of Philip Share (D. App. 1360-1361, 1385); and that 166 were in the handwriting of Leo Shaffer (D. App. 1364-1366, 1392-1393).

The trial commenced on June 22, 1959. Two days prior thereto, newspapers and television comments recited that the defendants had been convicted of crimes and had been indicted for serious crimes and that most of them were ex-convicts. Commenting on this publicity, the Court of Appeals observed: "There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants,

characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions." Prior to trial the defendants moved for a continuance thereof and for a transfer of the trial to another venue (D. App. 87-90). The Court denied the motions (D. App. 108-112).

The Court conducted an extended examination of the prospective jurors (D. App. 115-211). The defendants Philip Share, Irwin Gordon and James Tamer are also filing a Petition for Writ of Certiorari with this Honorable Court and have gone into lengthy detail regarding the interrogation of prospective jurors by the Court and the selection of jurors, and therefore these details are not recited here, in the interest of brevity and saving the time of this Court. It appears, however, that the examination of each juror was had in the presence of the remaining jurors; they were not examined separately out of the hearing of other jurors.

The Court instructed the jury at extreme length. There was a total of forty-eight instructions, and they appear in 104 pages of the Defendants' Appendix (D. App. 1453-1558). The instructions to the jury permitted the jurors to find any two or more of the defendants guilty, and also to find any defendant guilty if the evidence showed him to be an aider and abettor. An exception was made to the instructions as a whole because it was stated that in order to convict, the Government must prove that all of the defendants were co-partners and that there must be eight co-partners, and it is improper to allow a conviction of less than eight partners (D. App. 1561). Exceptions were also made (D. App. 1561-1562) to the Court's refusal to give defendants' tendered instructions 48 (P. App. 2048), 49 (P. App. 2049), 54 (P. App. 2053), 51 to 71 (P. App. 2050-2061), 76 (P. App. 2062), 81 (P. App. 2063), 82 (P. App. 2063), 83 (P. App. 2064), 84 (P. App. 2064), 87 (P. App. 2064), 92 through 94 (P. App. 2066), 95 (P. App. 2067), 96 (P. App. 2068) and 97 (P. App. 2068-2069).

STATUTES AND REGULATIONS INVOLVED.

Section 7203, Internal Revenue Code, 1954:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (*other than a return required under authority of section 6015 or section 6016*), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7701 of Internal Revenue Code, 1954:

> "(a) When used in this title, * * * —
>
> (1) Person.—The term 'person' shall be construed to mean and include an individual, * * *, partnership, association, company * * *.
>
> (2) Partnership and partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization."

Section 4401 of Internal Revenue Code, 1954:

> "(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 per cent of the amount thereof."

Section 4411 of Internal Revenue Code, 1954:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of Internal Revenue Code of 1954, Registration. (26 United States Code, Section 4412.)

"(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

"(1) his name and place of residence;"

Section 4901 of Internal Revenue Code, 1954:

"(a) Condition precedent to carrying on certain business.—

"No person shall be engaged in or carry on any * * * business subject to the tax imposed by section 4411 (wagering), * * * until he has paid the special tax therefor.

"(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any * * * business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following."

Section 4902 of Internal Revenue Code, 1954, Liability of Partners.

"Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax."

Section 7272, Internal Revenue Code, 1954:

"In general.—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

Section 371, Title 18, U. S. C.:

§ 371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud

the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 2, Title 18, U. S. C.:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Regulation Section 325.55 Partnership Liability:

"Any number of persons doing business in *copartnership shall be required to pay but one special tax.* The collector may issue a special tax stamp to a copartnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

Regulation Section 325.30 Return:

"(a) Every person required to pay the tax on wagers imposed by * * * the Code shall prepare each month from the daily records required by section 325.32 a return, in duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue *for the district in which is located the office or principal place of business of the person required to make the return.* If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of

internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the collector at Baltimore, Md. The return shall be filed on or before the last day of the month following that for which it is made."

Regulation Section 325.50 Registry, Return, and Payment of Tax:

"(a) Every person engaging in the business of accepting wagers and liable to the 10 per cent excise tax imposed by * * * the Internal Revenue Code (* * *) and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein.

"(b) * * *.

"(c) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. * * *."

REASONS FOR GRANTING WRIT.

1.

Each of the counts charged that the petitioners, Leo Shaffer, Jules Horwick and Edgar M. Wyatt, together with five other defendants, Philip Share, Irwin Gordon, James Tamer, Joseph Jacobson and Charles L. Sumner, were engaged in the business of accepting wagers *as co-partners* in a wagering syndicate at Terre Haute, Indiana. Count I charged a conspiracy. Counts II, III and IV charged substantive crimes of accepting wagers as co-partners, of owing an Excise Tax as co-partners. Count V charged that the defendants, as *co-partners* of a wagering syndicate, failed to pay the special tax imposed under Section 4411 of the Internal Revenue Code, and that they failed to file an Application for Registry-Wagering, pursuant to Section 4412.

Section 4421, in so far as it applies to this case, states that the term "wager" means:

> "A. any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers."

Section 4411 of the Internal Revenue Code of 1954 provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of the Internal Revenue Code of 1954 provides that each person required to pay a special tax shall register with the official in charge of the Internal Revenue District (1) his name and place of residence; also the name and place of residence of each person who is engaged in

receiving wagers for or on behalf of any person liable for tax under subchapter A. Subsection (b) provides:

> "Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered."

Count V charged the facts alleged to have violated Section 7203 of the said Internal Revenue Code. This section provides that whoever is guilty of the crime or crimes alleged in Count V shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than one year, or both, together with the costs of prosecution.

The several charges in the indictment described the defendants as co-partners in a wagering syndicate, as authorized by the Internal Revenue Code of 1954, and the Regulations of the Commissioner of Internal Revenue.

Section 4902 of the Internal Revenue Code provides that "any number of persons doing business in co-partnership in any one place shall be required to pay but one special tax."

Section 7701 of the Internal Revenue Code defining words used in Title 26, U. S. C., provides:

> "(1) Person.—The term 'person' shall be construed to mean and include an individual, * * *, partnership, association, company * * *.
>
> "(2) Partnership and partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization."

Regulation Section 325.55 provides:

> "Any number of persons doing business in co-partnership shall be required to pay but one special tax. The collector may issue a special tax stamp to a co-partnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

It was incumbent upon the Government to prove beyond a reasonable doubt that all of the defendants named in the indictment committed the several offenses charged *as co-partners* of a wagering syndicate, and not as persons accepting wagers *individually* or for his own respective account.

The Government failed to prove that the defendants conspired with each other, as co-partners, to commit the offense in Count I. They failed to prove the defendants committed the crimes, as co-partners, charged in Counts II, III, IV and V.

There was absolutely no proof that the partnership entity, as distinguished from the individual members thereof, failed to file an Application for Registry-Wagering, or that the partnership entity, as distinguished from the individual members thereof, failed to file Excise Tax Returns, Form 730, or that the partnership entity, as distinguished from the individual members, failed to pay any Excise Taxes.

The Government introduced testimony that none of the defendants *individually* had filed an Application for Registry-Wagering, Form 11-C (D. App. 221-223), and that none of them *individually* filed the monthly wagering Excise Tax Returns, Form 730 (D. App. 223-232) in the Internal Revenue office located at Indianapolis, Indiana. There was testimony that neither E. M. Wyatt Company nor Wyatt Service Company filed the said forms (D. App. 234-235), nor that Wyatt & Shaffer filed those forms (D. App. 235-236).

Revenue Agent Hopkins produced Exhibits 1, 2, 3, 4 and 4(a), all with respect to E. M. Wyatt. Exhibit 1 was an Application for Registry-Wagering for the period of September 12 to June 30, 1958, signed by E. M. Wyatt, and filed in the Office of the District Director at Indianapolis, Indiana. Exhibits 2, 3 and 4 were returns by Mr. Wyatt, respectively for the months of September, October and November, 1957 (D. App. 238-240).

Government Agent McCann asked Wyatt, with respect to his Application for a Registry-Wagering, whether he intended to have partners and Wyatt said "No." He signed his Application as "Owner" (D. App. 304) and Exhibits 2 and 3, monthly wagering tax returns for September and November of 1957 were signed by him as "E. M. Wyatt, Owner" (D. App. 308).

There is nothing in all of the evidence and testimony introduced by the Government to show that E. M. Wyatt was not the owner of his wagering business. There is nothing in the same evidence or testimony to show that he was a partner of any of the defendants in this case.

His elimination as a partner destroys the Government's allegations that the eight defendants named in the indictment, and each count thereof, were co-partners.

The Court of Appeals, in commenting on whether the Government proved a partnership, stated:

> "More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E. M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One

> bettor on inquiring whether he was betting with defendant Shaffer was informed 'Yes, with his company.'" (P. 52, this Petition.)

Of course, the bettor's comment that he was betting with Shaffer's company can in no way bind any of the defendants. The Court of Appeals noted (P. 53, 54, this Petition):

> "On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the months of September, October and November, 1957. They were signed 'E. M. Wyatt, owner' and in the aggregate covered the tax due on wagers in the amount of $5625.00."

And it continued further as follows (P. 54, this Petition):

> "We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership or syndicate operation is without merit."

The conclusion of the court that the defendants conspired to utilize the registration and monthly tax returns of Wyatt as a front to mask the wagering operation actually conducted by them, with the design of evading the substantial tax actually due, strengthens the petitioners' position that Wyatt was not a member of a specific partnership described in the indictment.

The Government introduced a summary of wagers ap-

pearing on its Exhibit 136 (P. App. 2225-2238), identified in the handwriting of six defendants, Gordon, Tamer, Horwick, Share, Shaffer and Wyatt, based on the testimony of Government witnesses Glen Johnson, Howard Doulder and Edwin Schroeder, indicating *individual* wagers taken by them, respectively. At page 2238 of Plaintiff's appendix are the individual totals of the bets taken by each of the said defendants, and a total of all of them.

The defendants did not hold themselves out as partners. Their association with each other in restaurants or at hotels is no indicia of a partnership. None of the elements of a partnership was introduced by the Government, that of sharing in the profits or in the losses. This was recognized by the trial court in its instruction (D. App. 1496) "An employee or an agent of the alleged partnership does not assume the risk of profit and/or loss of the partners. A partnership under the Internal Revenue Act of 1954 is a separate person or entity from the partners or persons who constitute the partnership for the purpose of the wagering law." Again, the trial court instructed the jury that the partners assumed the risk of profit or loss, as principals (D. App. 1494).

There was some doubt in the mind of the trial judge as to whether there was a partnership because he inaccurately instructed the jurors that *each* of the defendants is charged with the several counts in the indictment (D. App. 1515, 1516, 1517, 1518, 1520), whereas the actual fact is that *all* of the defendants were indicted as co-partners of a wagering syndicate, an entity recognized and authorized by the Internal Revenue laws and its regulations.

There was a complete failure of proof, or at least a fatal variance, of the allegations that the defendants, as co-partners in a wagering syndicate, committed the crimes charged in the indictment. *Stirone* v. *United States,* 361 U. S. 212, 215-218.

2.

The court gave the following Instruction No. 35 to the jury (D. App. 1540-1543):

"In all Five (5) Counts of the Indictment, the defendants are alleged to have been partners in a wagering business. I have defined partners elsewhere in these instructions. The United States must prove by direct or circumstantial evidence that the defendants were partners, irrespective of the quantity of their shares in the partnership, if it does not prove beyond a reasonable doubt that defendants were partners you must acquit such defendant or defendants of all Five (5) Counts of the Indictment, providing such defendants were not aiders or abettors as defined elsewhere in Instruction No. 41. This is so because a non-partner under Counts One (1), Two (2), Three (3), and Four (4) would not be obligated for the monthly wagering excise tax on accepted wagers of the partnership wagering business, nor is such non-partner obligated to register as a member of the partnership as charged in Count Five (5) of the Indictment unless such non-partner was an employee receiving wagers for the partnership and this is explained in the other instructions. However, you may find that such non-partner may be guilty of all Counts of the Indictment if he were an aider or abettor as defined elsewhere under these instructions.

"Also, I instruct you that even if you find all of the defendants were all partners in the business as alleged in all Counts of the Indictment you must determine from the evidence beyond a reasonable doubt that each of them are guilty of the essential elements and facts of such Counts of the Indictment under the law as explained in all of these instructions. However, this does mean that each partner did himself perform all of the various acts charged in the Indictment for he would be guilty if he willfully and knowingly instigated, or caused, or assented that the acts be done by the other partners, agents, or employees of the partners but such partner must have done so knowingly and willfully with a specific intent himself, to violate the laws al-

leged in the Indictment. Even though you find all defendants were partners, it would be possible, if the evidence and under the law given you in these instructions so warrants, for one or more of the partners to be not guilty of the offenses charged even though other partners be guilty of the offenses charged in the Indictment.

"If you find that a defendant or defendants engaged in the business of accepting wagers individually and not as partners, then the United States has not proved there was a partnership as to such defendant or defendants and you should acquit such defendant or defendants of all Counts of the Indictment. If you find that a defendant or defendants engaged in the business of accepting wagers individually, independently and separate from the other defendant or defendants without any conspiracy agreement between them as charged in Count One of the Indictment, then you should acquit such defendant or defendants. However, you may find that such defendant or defendants may be guilty of all Counts of the Indictment if he or they were aiders or abettors as defined elsewhere under these instructions.

"If you find that there were two or more partnerships engaging in the business of accepting wagers at 671½ Wabash Avenue, Terre Haute, State of Indiana, during the time or times in question, you must determine from the evidence beyond a reasonable doubt whether or not the specific partnership as charged in Count One (1), and the specific partnership as charged in Count Two (2), and the specific partnership as charged in Count Three (3), and the specific partnership as charged in Count Four (4), and the specific partnership as charged in Count Five (5) of the Indictment has or have been proved. If the specific partnership of two or more of the defendants as charged in the several Counts of the Indictment have not been proved, you should acquit the defendant or defendants even though you find partnerships other than the partnership charged in the several Counts of the Indictment. The defendants, at least two or more, must be

members of the specific partnership charged in the several Counts of the Indictment and their membership in another partnership will not warrant their conviction of the charged partnership in the several Counts of the Indictment. If you find part of the defendants were members of a partnership and the other defendants were members of another partnership and both were guilty of the identical essential elements and facts of the crimes as alleged in Counts One (1), and or Two (2), and/or Three (3), and or Four (4), and or Five (5) of the Indictment and you further find that the crime and/or crimes charged in Counts One (1), and or Two (2), and/or Three (3), and or Four (4), and or Five (5) of the Indictment has or have not been proved beyond a reasonable doubt then you should acquit the defendants of such Count and/or Counts that have not been proved for the reason that you cannot under the charges find part of the defendants guilty of the partnership crime or crimes and the other defendants guilty of the other partnership crime or crimes in one verdict on a Count of the Indictment charging only one specific partnership. However, if you find that the specific partnership of two or more of the defendants charged in a Count of the Indictment existed beyond a reasonable doubt in addition to other partnerships, you must determine the guilt or innocence of the defendants in the charged partnership."

The Court also gave its Instruction No. 36 (D. App. 1543-1544):

"If you find any of the defendants were not partners and you find from the evidence beyond a reasonable doubt that such defendant was merely an employee of the alleged partnership in question and did or did not receive wagers for such partnership, you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41. This is so because a mere employee who did or did not receive wagers for the partnership was not obligated for the monthly wagering excise tax on accepted wagers of

the partnership wagering business, this was the partners' obligation not the employee, nor is such employee obligated to register for the partnership and pay the yearly occupational tax for the partnership because he was not a member of the partnership and this was the duty of the partnership.

"Also, I instruct you that even if you find one or more of the defendants were employees of the alleged partnership and receiving or not receiving wagers in behalf of such partnership it would be possible, if the evidence and under the law given you in these instructions so warrants, for such employee defendant to be guilty of the offenses charged if he were an aider and abettor as defined elsewhere under these instructions."

These confusing and lengthy Instructions contain prejudicial and repugnant statements to the jury. It requires them, correctly, to acquit the defendants if they find they were not partners, but adds "provided that the defendants were not aiders and abettors." This latter statement in itself contains a glaring repugnancy because if the defendants are partners they are the principals and cannot be aiders and abettors to themselves. *United States* v. *Horton*, 7 Cir., 180 F. 2d 427, 431.

In other portions of the foregoing Instruction the Court permits the jury to depart from the charge in the five Counts of the Indictment that the defendants were partners and departs from a correct Instruction and permits the jury to find two or more defendants guilty if they are members of a partnership. It is obvious that this incorrect portion of the Instruction permits the jury to find certain defendants guilty of operating a partnership different from the one charged in the Indictment. Certainly this single sentence in the Instruction: "Even though you find all defendants were partners, it would be possible, if the evidence and under the law given you in these instructions so warrants, for one or more of the partners to be not guilty of the offenses charged even though other partners be guilty

of the offenses charged in the Indictment." contains in itself a serious repugnancy and a confusing statement.

Another portion of the Instruction contains a correct statement:

> "If you find that a defendant or defendants engaged in the business of accepting wagers individually and not as partners, then the United States has not proved that there was a partnership."

As to such defendant or defendants this paragraph of the Instruction concludes:

> "However, you may find that such defendant or defendants may be guilty of all counts of the Indictment if he or they were aiders or abettors."

Here again it is manifest that if a defendant was engaged in the business of accepting wagers individually and not as a partner, he could not be an aider and abettor because if he were an aider and abettor he could not be engaged in the business of accepting wagers individually. He could not aid and abet himself.

A reading of the entire Instruction shows other repugnancies. The giving of such instructions is prejudicial and reversible error.

These last named instructions were not accurate since *each* of the eight defendants was not charged with the various crimes set forth in the indictment. All of the defendants were charged as an entity, a co-partnership in a wagering syndicate.

Instructions 28 and 29 are certainly repugnant to the first part of Instruction No. 35, in which the jury is advised that the defendants are charged to be partners in a wagering business and that if the Government does not prove beyond a reasonable doubt that the defendants are partners you must acquit *each* defendant or defendants of all five Counts of the Indictment (D. App. 1540). This

is a correct instruction since it accurately recites the charges in each Count of the Indictment that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate (D. App. 19; 23; 25; 26; 28).

It is difficult to understand the *meaning* of some of the instructions read to the jury. For example, Instruction No. 33 (D. App. 1537) concludes as follows:

> "If you find from the evidence beyond a reasonable doubt that any defendant or defendants committed the alleged offenses in Counts Two (2) *and/or* Three (3), *and or* Four (4), *and/or* (5) *and/or any other criminal offense* and you further find that the United States *has not proved* beyond a reasonable doubt that two or more of such defendants *did not conspire* as alleged in Count One (1) to commit the substantive offenses of wilful attempt to evade and defeat the wagering excise tax in one or more of the tax periods of September, and or October, and or November, 1957, as alleged in Count One (1) of the Indictment, then you must acquit that defendant or defendants of Count One (1)" (D. App. 1538) (Italics supplied).

Why the trial court inserted a phrase that the jury might find beyond a reasonable doubt that any defendant or defendants committed "any other criminal offense" is unfathomable, particularly since a necessary *verb* is omitted. The sense of the remaining part of the instruction becomes clouded by the use of a double negative stating that if the jury find that the United States *has not proved* that two or more of the defendants *did not conspire* as alleged in Count One (1), then you must acquit that defendant or defendants of Count One.

Again, in a long Instruction, No. 30, with respect to the conspiracy count, the Court charged the jury (D. App. 1529):

> "If you find that there were two or more conspiracies,

you must determine from the evidence beyond a reasonable doubt whether or not the specific conspiracy, of on or about September 1, 1957, as charged in Count One (1) of the Indictment has been proved. If the specific conspiracy as charged in Count One (1) has not been proved you should acquit the defendants even though you find conspiracies other than that charged in Count One (1) of the Indictment. Two or more of the defendants must be members of the specific charged conspiracy in Count One (1) and their membership in another conspiracy will not warrant their conviction of the charged conspiracy in Count One (1). If you find part of the defendants were members of a conspiracy and the other defendants were members of another conspiracy and both of which conspiracies had the identical essential elements and facts of the conspiracy as alleged in Count One (1) of the Indictment and you further find that the specific conspiracy of two or more of the defendants as charged in Count One (1) has not been proved beyond a reasonable doubt, then you should acquit the defendants for the reason that you cannot under the charges of Count One ~~(1)~~ find part of the defendants guilty of one conspiracy and the other defendants guilty of the second conspiracy in *one verdict* on Count One (1) of the Indictment. However, if you find that the specific conspiracy of on or about September 1, 1957, charged in Count One (1) existed beyond a reasonable doubt in addition to the other identical conspiracy, you must determine the guilt or innocence of the defendants in the charged conspiracy" (Italics supplied).

In this Instruction, the Court told the jury that if they find part of the defendants were members of a conspiracy and the other defendants were members of another conspiracy, both of which had the identical elements of the conspiracy charged in Count One (1), and that the specific conspiracy as charged in Count One (1) has not been proved beyond ~~a~~ reasonable doubt, then the defendants should be

found not guilty because the jury could not find part of the defendants guilty of one conspiracy and the other defendants guilty of a second conspiracy in *one verdict.*

Then follows a repugnant statement to the jury, in which the jury is told that they must determine the guilt or innocence of the defendants in the *charged conspiracy* if they find that the said conspiracy existed beyond a reasonable doubt in addition to the *other identical* conspiracy.

Not only is there a repugnancy in the foregoing language of the Court, but it must have been as confusing to the jury as was the previously quoted instructions.

The number and length of the Instructions given were surely confusing to the jury and were improper. 23 C. J. S. 889, § 1303. There are over 100 printed pages of instructions (D. App. 1453-1557).

The confusion in the Instructions was compounded by the numerous and continuous use of the phrase "and/or" (D. App. 453-1557).

There is only one specific entity charged as the perpetrator of the crimes charged in the indictment, the specific co-partnership consisting of the eight defendants. The indictment did not charge a specific partnership consisting of two or more of the defendants. There were eight defendants charged as constituting the specific co-partnership named in the indictment. The word "specific" has a special, limited and restricted meaning.

81 C. J. S., 400, defines the adjective "specific" as meaning "definite or making definite; explicit; particular; of an exact or particular nature; tending to specify or make particular; precise; limited or precise; precisely formulated or restricted. Although the term is relative, it is limited to a particular, definite, or precise thing, and implies precise or explicit designation."

The Court also gave the following instruction No. 41 on aiders and abettors to the jury (D. App. 1549-1551):

"Each of the eight (8) defendants are charged as principals in each of the Five (5) Counts of the Indictment. If you find from the evidence beyond a reasonable doubt that a part of the defendants were not principals and that two or more of the defendants are guilty as principals as partners of one or more or all of the Counts of the Indictment, then I call your attention to Title 18 United States Code Crimes and Criminal Procedure, Section 2. The following quoted pertinent parts of such section were in full force and effect at the times alleged in Counts One (1), Two (2), Three (3), Four (4), and Five (5):

> "'(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "'(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'

"Thus a defendant may be charged in the Indictment as a principal by reason of being an aider, abettor, counsellor, commander, inducer or procurer of the commission of one or more or all of the offenses. Also, a defendant under said section may be guilty of one or more or all of the offenses without proof that he personally did every act constituting the said offenses, providing such defendant willfully and knowingly participates in the commission of the offense or offenses.

"With respect to the criminal conspiracy, Count One (1) of the Indictment, it is unnecessary that such aider knew the full extent of the alleged conspiracy or knew all the members of such alleged conspiracy.

"However, before you consider the evidence as to whether or not any of the defendants was or was not an aider, abettor, counsellor, commander, or procurer of the charged offense and/or offenses, you must ascertain and first determine from the evidence and beyond

a reasonable doubt that two or more of the principal defendants as partners were guilty of such offense and/or offenses. That is to say, the aider, abettor defendant or defendants could not have aided, abetted, counselled, commanded or procured the commission of such offense and/or offenses unless there were two or more guilty principal defendants as partners.

"And in order to aid and abet another to commit one or more or all of the alleged offenses, it is necessary that a defendant willfully and knowingly associate himself and participate in some way, as charged, with the criminal venture as charged, and that he willfully and knowingly participate in it as in something he wishes to bring about; and that he willfully and knowingly seek by some action of his to make it succeed. The aider and abettor must have the same specific criminal intent that I have referred to in these instructions."

It will also be noted (D. App. 1540) that in Instruction No. 35 (D. App. 1540), the jury was told that they must acquit the defendants on all the counts of the Indictment, but the Court added: "Provided such defendants were not aiders and abettors as defined elsewhere in Instruction No. 41." Similar statements were made in Instruction No. 35, at D. Appendix pages 1541, 1542 and 1544.

All of the defendants were indicted as members of a co-partnership for accepting wagers as co-partners in a wagering syndicate (D. App. 18-28).

Section 4902 of the Internal Revenue Code of 1954 recognizes that a co-partnership is a legal entity and a legal unit for the purpose of paying a special tax. This Section reads:

"Any number of persons doing business in co-partnership at any one place shall be required to pay but one single tax" (D. App. 1501).

The word "person" as used in the Internal Revenue Code (Title 26 U. S. C.) is defined by Section 7701, reading as follows (D. App. 1506-7):

"(a) When used in this title, * * *

(1) Person—The term 'person' shall be construed to mean and include an individual, * * * partnership, association, company * * *.

(2) Partnership and partner—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, * * * and the term 'partner' includes a member in such syndicate, group, pool, joint venture, or organization" (App. 1506-1507).

Regulation Section 325.55 of the Internal Revenue Code provides:

"Any number of persons doing business in co-partnership shall be required to pay but one special tax. The collector may issue a special tax stamp to a co-partnership in a firm or trade name, provided the names and addresses of all members of the partnership are disclosed on Form 11-C, Special Tax Return."

Since a partnership is considered a legal entity for the purpose of engaging in the business of accepting wagers, that partnership is a principal and cannot be an employee nor an aider nor an abettor, nor an accessory of or to itself.

Since the foregoing Section 7701 defines the term "partner" to include a member in a syndicate, group, joint venture or organization, he must perforce be a principal of the partnership of which he is a member. He cannot aid, assist or abet, advise or counsel himself in the commission of a crime.

There is no evidence whatever in this cause that any defendant was an aider or abettor of any other defendant, nor that any defendant was an employee of any other defendant. Under the foregoing circumstances it was reversible and prejudicial error to have given the foregoing in-

struction and to have added the foregoing proviso complained of in other instructions. This is so held in *United States* v. *Horton*, 7 Cir., 180 F. 2d 427, 431; see also *Bollenbach* v. *United States*, 326 U. S. 601, 613-615; *United States* v. *Donnelley*, 179 F. 2d 229, 233.

Furthermore, it appears from the opinion of the Supreme Court of the United States, in the case of *United States* v. *Calamaro*, 354 U. S. 351, 360, that there can not be an aider and abettor to one who is engaged in the business of accepting wagers as a principal. In this case a "pick-up" man, having no proprietary interest in a "numbers game" was convicted of failing to pay the Occupational Tax and was fined $1,000.00.

The Court pointed out (page 352) that the Internal Revenue Code enacted two kinds of wagering taxes: (1) an Excise Tax imposed on persons "engaged in the business of accepting wagers," and (2) a special Occupational Tax, imposed not only on persons who are subject to the Excise Tax by "engaging in the business," but also all those who are "engaged in receiving" on behalf of one subject to the excise tax. It appears then that any defendant involved in this appealed case, if he accepted a wager, was a principal.

At page 360 of the *Calamaro* opinion, the Court held:

> "* * * that in the light of the unambiguous legislative history of the excise tax, it 'applies only to one who is engaged in the business of accepting wagers' as a principal * * * on his own account."

There was nothing in the indictment to indicate that any defendant was indicted as an aider and abettor. The indictment charged *all* of the defendants as members of a co-partnership, and hence, as principals. The giving of an instruction permitting the jury to find any defendant guilty of being an aider and abettor to another defendant

or other defendants, permitted the Government to try the defendants on another theory. This cannot be done. *Stirone* v. *United States*, 361 U. S. 212, 215-218.

The Court of Appeals, however, answered the foregoing objections and argument by observing (p. 54, this Petition):

> "The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy."

Considering the instructions in their entirety does not obliterate, not one, but three or four, erroneous instructions, which have heretofore been described and analyzed. The instruction on guilt as an aider and abettor may correctly state the law, but it was wholly inapplicable to the facts before the jury. It only becomes applicable when there is a principal whom one can aid and abet. In this case the principal was an entity consisting of eight co-partners, each one of whom is a principal.

The foregoing statement of the Court of Appeals does not answer the petitioners' claim of repugnancy in the instructions. The instructions in their entirety do not cure any erroneous, prejudicial instruction.

In *Bollenbach* v. *United States*, 326 U. S. 607, in reversing

a conviction because of an erroneous charge, the Court at page 614 said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In *Nicola* v. *United States*, 72 F. 2d 780, the Court, at page 787 said:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

Bollenbach and *Nicola* were cited in *United States* v. *Donnelley*, Cir. 7, 179 F. 2d 227, where the court said at page 233:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error. *Nicola* v. *United States*, 3 Cir., 82 F. 2d 780, 787; *McFarland* v. *United States*, D. C. Cir., 174 F. 2d 538, 539. A conviction ought not rest on an equivocal direction to the jury upon a basic issue. *Bollenbach* v. *United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350."

To the same effect is *Patterson* v. *United States*, 5 Cir. 183 F. 2d 687, 690; *United States* v. *Semenuik* (Cir. 7), 193 F. 2d 508; *United States* v. *Donnelley* (Cir. 7), 179 F. 2d 227, 233.

3 AND 4.

Homer H. Forrester, an Internal Revenue Service Agent in Reno, Nevada, testified that Defendants Irwin Gordon and Philip Share did not file an Application for Registry-Wagering Form 11-C for the period of July 1, 1957 to and including June 30, 1958, and that the said defendants did

not file Form 730 in the Office of the Internal Revenue Service in Reno, Nevada (D. App. 257-260).

John A. Wheeler, an Internal Revenue Service Agent, testified that neither Leo Shaffer nor Jules Horwick filed similar documents in the District Director's Office at Chicago, Illinois (D. App. 260-263).

Anthony Stapke, another Internal Revenue Service Agent, testified that Philip Share failed to file similar papers in the office of the District Director of Internal Revenue at Los Angeles (D. App. 262-263).

Imogene Barlow, an Internal Revenue Agent testified that James Tamer failed to file these documents in the office of the Internal Revenue Service in Detroit (D. App. 264-265) and Joseph J. Marchioni, another Internal Revenue Agent, testified that these forms had not been filed in the office of the Internal Revenue Service in Baltimore by the aforesaid defendants.

It appears from the evidence that the principal place of business of the defendants charged with the crimes in the indictment was at Terre Haute, Indiana, at 671½ Wabash Avenue (D. App. 398-401).

Hotel register cards introduced by the Government indicated that the residence of defendant Joseph Jacobson was Miami, Florida (D. App. 391-392); that of the defendant Charles L. Sumner was Indianapolis (D. App. 379); that of defendant Jules Horwick was Chicago, Illinois; that of Philip Share was Sherman Oaks, California; and that of Irwin Gordon was Las Vegas, Nevada (D. App. 393-394).

Government witness Delbert Paul Hopkins testified that he found no record in the office of the Internal Revenue Service located in Indianapolis, Indiana, that either Leo Shaffer, Jules Horwick, James Tamer, Joseph Jacobson, Charles L. Sumner, Irwin Gordon, or Philip Share filed an application for registry wagering, Form 11-C, in the

Indianapolis Internal Revenue office (D. App. 222-223, 226). This witness testified that there was no record of payments of Excise Wagering Tax by the said defendants (D. App. 282).

Regulation Section 325.50 promulgated by the Secretary-Treasurer under the provisions of the Internal Revenue Act, provides that the Application for Stamp Tax, Form 11-C, shall be filed

> "with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein" (D. App. 1512).

Regulation Section 325.30 requires the Excise Tax Returns, together with the amount of tax, shall be filed

> "with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. If such person resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If such person has no office, residence, or principal place of business in the United States, the return shall be filed with the collector at Baltimore, Md. The return shall be filed on or before the last day of the month following that for which it is made" (D. App. 1509-1511).

There is no understandable reason why the Government was permitted to prove that certain defendants did not file an application for a Registry-Wagering form or that they did not file the Excise Tax Returns, Form 730, in the respective cities of their respective residences nor in Indianapolis. The jury was instructed that they were to "try the case upon the evidence and the legitimate inferences you may draw from the evidence" (D. App. 1551). The jury was therefore permitted to infer, from the testimony of the foregoing witnesses, that the aforesaid defendants committed crimes in the cities of their respective residence and in Baltimore, Maryland and individually in Indianapolis.

The indictment charged the commission of crimes in Terre Haute, Indiana, within the Internal Revenue District of Indianapolis.

According to the regulations heretofore cited, the only place where the defendants *as a copartnership*, should have filed Form 11-C and Form 730 was in the office of the District Director of Internal Revenue at Indianapolis. It is only where the taxpayer does not have an office or principal place of business in the United States that his return must be filed with the Collector of Internal Revenue in the state in which he resides, and if he has no office or residence or principal place of business in the United States, the forms under discussion must be filed at Baltimore, Maryland.

The testimony of these witnesses becomes especially prejudicial in view of an instruction of the Court (D. App. 1538) in which it said "If you find from the evidence, beyond a reasonable doubt, that any defendant or defendants committed the alleged offenses in Counts Two (2) and /or Three (3) and/or Four (4) and/or Five (5) *and/or any other criminal offense* and you further find that the United States has not proved beyond a reasonable doubt that two

or more of such defendants did not conspire as alleged in Count One (1) to commit the substantive offenses of willful attempt to evade and defeat the wagering excise tax in one or more of the tax periods of September, and or October, and or November, 1957, as alleged in Count One (1) of the Indictment, then you must acquit that defendant or defendants of Count One (1)."

The Court of Appeals stated (P. 56, this Petition):

> "Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible."

It is difficult to determine whether the Court of Appeals was referring to the failure of the defendants to file Forms 11-C and 730 in the Indianapolis office, or whether the Court's statement was intended to cover the failure to file the necessary documents in the cities of the respective residences of the defendants.

Whether or not the defendants were operating as *individuals* in their respective places of residence or as *individuals* in Terre Haute, Indiana, could not prove to the slightest degree that they were operating as a co-partnership within the allegations of the indictment. The Government had failed to prove the allegations in the indictment, charging the several crimes to have been committed in Terre Haute, Indiana; certainly the foregoing testimony that these defendants did not file *individual* returns with respect to Forms 11-C and 730, either in the cities of their respective residences or in Indianapolis would not have proved a single allegation in the indictment. The indictment required affirmative proof beyond a reasonable doubt and not negative proof.

Both the ruling of the trial court and the foregoing statement of the Court of Appeals are in conflict with decisions of this Honorable Court and of Courts of Appeal.

Testimony or evidence indicating or intimating to the jury that a defendant has committed another crime with which he is not charged constitutes reversible error. *Boyd* v. *United States*, 142 U. S. 450, 458; *United States* v. *McGee*, 261 F. 2d 609, 611; *Sang Soon Sur* v. *United States*, 167 F. 2d 431, 432.

5.

The court gave innumerable instructions that were confusing because of the use of the phrase "and or". This phrase appears forty-two times in the instructions. It appears ten times in D. App. 1480, three times in D. App. 1481, three times in D. App. 1487, twice in D. App. 1516, twice in D. App. 1519, three times in D. App. 1530, five times in D. App. 1531, four times in D. App. 1538 and ten times in D. App. 1543.

With respect to the use of this phrase, the Court of Appeals stated (Page 54, this Petition):

> "The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment."

This conclusion of the Court of Appeals is in direct conflict with decisions of other circuits and of this Hon-

orable Court. In *Irving Trust Co.* v. *Rose* (4 Cir.), 67 F. 2d 89, 90, the Court observed:

> "We do not approve of the use in formal pleadings of the dubious term 'and or', for in this connection it imparts uncertainty where clarity and definiteness are required."

"And or" was called a "linguistic abomination" in *Commercial Standard Ins.* v. *Davis* (5 Cir.), 68 F. 2d 108, 109, where the Court held:

> "The petition in the State Court is brought against 'Commercial Standard Insurance Company and or Century Indemnity Company,' and abounds in allegations containing that linguistic abomination 'and or' which certainly has no place in the art of pleading."

How much more important is clarity in instructions? Because of the lengthy, involved instructions, the numerous repugnancies in the instructions, the confusing and, in many instances, unintelligible language, and the repeated use of the phrase, "and or", the probabilities of confusion in the minds of the jurors are glaringly manifest. In *Bihn* v. *United States*, 328 U. S. 633, 638, the Supreme Court stated:

> "And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed."

6.

Government witness Glen Johnson, an expert accountant, was asked a number of hypothetical questions, in which he was requested to assume that the defendants were co-partners of a wagering syndicate. A sample of one of these questions is (D. App. 1289):

> "Now, Mr. Johnson, with the exception of the item

designated 'Office 120221' appearing on page one of Exhibit 137, and the items designated 'Telephone, 5000' appearing on 137-D or the fifth page of Exhibit 137, *assume* that the amount shown in the first or left-hand column of Government's Exhibit 137 and its component parts represents amounts receivable *or amounts due to the defendants as co-partners of a wagering syndicate* from various bettors during the months of September, October and November of 1957, and *assume* further that the amounts shown in the second or right-hand column of Government's Exhibit 137 represents amounts payable or amounts owed by the defendants *as co-partners of a wagering syndicate* to various bettors during the same period of September, October and November of 1957, and *assuming* further that the amounts receivable and payable resulted from gross wagers placed with, and accepted by, the *defendants as co-partners of a wagering syndicate* from bettors during the months of September, October and November of 1957, can you compute a total of both columns as previously identified of Government's Exhibit 137; that is, a total of both columns?'' (Italics supplied.)

Similar hypothetical questions were asked of Mr. Johnson (D. App. 1292, 1296-1297, 1299, 1302, 1303-1304, 1308, 1309-1310). Objections were made to these questions, particularly because there was no evidence in the case that the defendants were engaged in the business of accepting wagers as so-partners and that these hypothetical questions invaded the province of the jury (D. App. 1290, 1294-1295, 1298, 1300, 1302-1304, 1309-1312). The objection at D. App. 1300 directed the court's attention to the continuous repetition of the word ''syndicate'' and ''co-partnership''.

All of the objections were overruled (D. App. 1291, 1296, 1298, 1302-1304, 1308-1309).

All of these questions were directed to the mere computation of the totals of figures appearing on various

exhibits, such as the total of accounts receivable which were due individual defendants and the computation of the total of Excise Taxes that were due by individual defendants.

In the foregoing question set forth in full, Mr. Johnson was asked to *assume* that the figures in the left-hand column of Government's Exhibit 137 (Book of Exhibits, (p. 56) represented amounts receivable or due to the defendants as co-partners of a wagering syndicate, and that the right-hand column represented amounts receivable and payable which resulted from gross wagers accepted by the defendants as co-partners of a wagering syndicate. Examination of Government's Exhibit 137 in the Book of Exhibits does not indicate any basis for such assumptions in this question nor does Government's Exhibit 137D indicate any basis for the assumption. The same criticism can be made with respect to the hypothetical question (D. App. 1292) concerning Government's Exhibit 138 (Book of Exhibits, p. 62).

With respect to Exhibit 136 (Book of Exhibits, pp. 38-55), he was asked to assume (D. App. 1294) that the parts of this exhibit were records of gross wagers accepted by the defendants as co-partners of a wagering syndicate on various dates, represented in hundreds of dollars the amount of gross wagers accepted by the defendants as co-partners of a wagering syndicate. He was then asked to compute the total dollar amount of the gross wagers accepted by the defendants as such co-partners on football games played on November 29, 1957. The other hypothetical questions heretofore referred to were similar in nature. Both assumptions in the hypothetical questions invaded the province of the jury.

The five counts of the indictment charged the defendants with having committed the conspiracy and the substantive crimes of accepting wages *as co-partners in a wagering*

syndicate. That was the issue that the jury had to determine. The statutes and regulations with respect to accepting wagers, purchasing a stamp for said business and paying an excise tax on the wagers of 10%, recognize that a partnership was a distinct entity, separate and apart from the members thereof.

The hypothetical questions certainly invaded the province of the jury and contained an assumption of ultimate facts which had to be found by the jury. In the questions asked of the witness he was to assume that the defendants were engaged in the business of accepting wagers as co-partners and this was repeated almost twenty times. When the trial court overruled the objections to the hypothetical questions it, for all practical purposes, *directed* the jury to find that the defendants were "engaged in the business of accepting wagers as co-partners." These rulings by the court were erroneous and related to substantial rights of the defendants. In *Bihn* v. *United States*, 328 U. S. 633, 638, the Supreme Court said:

> "Yet as stated in *McCandless* v. *United States*, 298 U. S. 342, 347-348, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial'."

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1960—April Session, 1961.

Nos. 12862-12867
United States of America,
Plaintiff-Appellee,
vs.
Leo Shaffer, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

June 13, 1961.

Before SCHNACKENBERG, CASTLE and MAJOR, *Circuit Judges.*

CASTLE, *Circuit Judge.* Defendants-appellants, Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick and Edgar M. Wyatt were convicted on all counts of a five count indictment. Each was sentenced to concurrent four year terms on the first four counts, to a one year consecutive term on Count V, and was fined $10,000.00 on Count I, $10,000.00 on Count II and $5,000 on Count V,

making a total of five years imprisonment and $25,000.00 in fines.[1]

Count I of the indictment charges that defendants engaged in the business of accepting wagers as co-partners in a wagering syndicate at Terre Haute, Indiana, and in violation of 18 U.S.C.A. §371 conspired to wilfully attempt to evade and defeat a large part of the excise tax on wagers due and owing under Section 4401 of the Internal Revenue Code of 1954 for the months of September, October and November, 1957. Count II charges that defendants as co-partners in a wagering syndicate wilfully and knowingly attempted to evade and defeat the excise tax due on wagers totalling $326,315.20, accepted in the month of September, 1957, in violation of 26 U.S.C.A. §7201. Counts III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00 respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U.S.C.A. §7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954.

Defendants in their appeals assert numerous errors which may be summarized as presenting the following basic contested issues:

(1) Whether or not the defendants were tried by a fair and impartial jury.

(2) Whether or not there was substantial evidence sufficient to sustain the convictions of the defendants.

(3) Whether or not there was a variance between the indictment and the case as it was submitted to the jury under the instructions.

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1. Joseph Jacobson and Charles L. Sumner were also named as defendants and convicted. Their prison sentences were suspended and they did not appeal.

(4) Whether or not there was prejudicial and reversible error in the admission of evidence or in instructing the jury.

(5) Whether or not prejudicial and reversible error resulted from the government's calling of witnesses who invoked the Fifth Amendment.

(6) Whether or not the sentence imposed on each defendant under Count V of the indictment is excessive.

On the issue of whether there is substantial evidence to support the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Calvito*, 7 Cir., 284 F. 2d 464, cert. den., 365 U. S. 881; *United States* v. *Pinna*, 7 Cir., 229 F. 2d 216. With that rule in mind, we shall briefly refer to the facts and circumstances as developed by the proof.

From about the middle of September until November 30, 1957 a wager accepting business was conducted by telephone from a third-floor room in Terre Haute, Indiana, accessible from a street level entrance designated as 671½ Wabash Avenue. Most of the wagering was on the scores of college and professional football games. The bets were in sizable amounts, many ranging from $1,000.00 to $10,000.00, and totaled over three million dollars. The wagers were with bettors scattered throughout the United States from coast to coast and were received by long distance telephone calls.

In August of 1957 defendant Edgar M. Wyatt, a resident of Terre Haute, rented the room for a term of four months commencing September 1, arranged for the installation of eight telephones operating in banks of four with one unlisted number assigned to each bank, and for the receipt of sports wire service. He deposited $5,000.00 to

cover estimated long distance tolls for a thirty day period and paid in advance for fifteen days' billing on the wire service.

About the middle of September the other defendants arrived in Terre Haute from various other cities. Shaffer, Jacobson, and Tamer checked in simultaneously at a local hotel where Wyatt had previously reserved a suite of adjoining rooms for them. Horwick registered at a nearby hotel but a few days later removed to the hotel where the others were staying and occupied a room close to the suite. Share and Gordon arrived about a week later and Sumner shortly thereafter. Sumner was assigned to the suite occupied by Shaffer and Jacobson. The hotel was about two hundred feet from the entrance at 671½ Wabash Avenue.

All of the defendants were observed frequently in a restaurant adjacent to the entrance to the room and during periods when the latter premises was under surveillance were observed entering at various times in the morning, each using his own key to open the street level door which was always kept locked. The defendants usually left the premises together each evening. During the two and one-half month period involved over five thousand long distance telephone charges were made to the telephones.

More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E. M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One bettor on inquiring whether he was betting

with defendant Shaffer was informed "Yes, with his company".

On November 29, 1957 the room was entered pursuant to a search warrant at approximately 1:30 P. M. Horwick was leaving the premises. The remaining defendants, except Tamer, were in the room, three engaged in telephone conversations. Among other items, a record of bettor accounts receivable and payable was found on the premises. It reflects the net amount due from or payable to each bettor. There is no indication that the amount is due to or payable by any particular one of the defendants. Also found were betting slips recording wagers in the handwriting of all six defendants and schedules on which a running balance of the gross amount wagered on each game yet to be played was recorded. These amounts were identical with the total of the betting slips on the particular game. Where a game had been played there was an entry of the net gain or loss on that game.

None of the defendants had filed the special tax return and application for registry-wagering or a monthly excise tax return, as partners or members of any group or syndicate. With the exception of Wyatt, none of the defendants registered as being engaged in the business of accepting wagers during the period in question. In August of 1957 Wyatt had withdrawn from a partnership, known as the Clover Club, engaged in the business of accepting wagers at Terre Haute. He had previously signed and filed the special tax returns and applications for registry-wagering on behalf of that partnership which listed and identified the partners as required by law and pertinent Treasury Regulation. On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the

months of September, October and November, 1957. They were signed "E. M. Wyatt, owner" and in the aggregate covered the tax due on wagers in the amount of $5625.00.

We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership[2] or syndicate operation is without merit.

The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy.

There is no evidence here that the acts of concealment were for the purpose of concealing prior criminal acts

2. 26 U. S. C. A. § 7701 defines "partnership" as including a "syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on * * *".

and the instructions tendered on such theory were properly refused. *United States* v. *Clancy*, 7 Cir., 276 F. 2d 617.[3] Nor was there a basis for the lesser included offense instructions requested by defendants. Here it was possible to have committed the greater offense charged without having committed the lesser (evasion of the occupational tax on wagering in violation of 26 U.S.C.A. § 7262). The instructions were properly refused. Cf. *James* v. *United States*, 9 Cir., 238 F. 2d 681; Rule 31(c), Federal Rules of Criminal Procedure, 18 U.S.C.A.

Defendants claim there is a variance between the indictment and the instructions under which the case was submitted to the jury. It is argued that a fatal variance resulted from the instructions permitting conviction of all defendants if any two or more were members of the specific partnership charged in the indictment and the remaining defendants were aiders and abettors. We do not agree. The elimination of one or more of the defendants as a member of the wagering syndicate does not eliminate the existence of the syndicate. And it is not necessary that aiders and abettors be charged as such in the indictment. *United States* v. *Monticello*, 3 Cir., 264 F. 2d 47; *Mays* v. *United States*, 8 Cir., 261 F. 2d 662. There was no variance and *Stirone* v. *United States*, 361 U. S. 212, relied upon by defendants is without application.

Defendants' reliance upon *Ingram* v. *United States*, 360 U. S. 672, is misplaced. *Ingram* involved convictions of conspiracy to evade and defeat payment of the wagering excise tax but the convictions which were reversed were those of two employees without proprietary interest in the operation and the reversals were based on a lack of evidence of any knowledge of the employers' tax liability. Evidence of knowledge was not lacking in the instant case.

3. Reversed on other grounds, 365 U. S. 312.

Wyatt's occupational tax stamp was posted on the wall of the room.

The defendants contend that the District Court committed reversible error in the admission of testimony and exhibits concerning the previous partnership relationship of Wyatt in the Clover Club operation and the special tax returns and applications for registry-wagering executed and filed by him which listed the partners in that operation. At the time of its admission this evidence was limited to defendant Wyatt and its was admissible to show his knowledge of the wagering-registry requirements of the Internal Revenue Code. We perceive no error in this connection. Nor was it a basis for a mistrial or severance.

It is urged that the court erred in permitting a government witness, whose qualifications are not in dispute, to testify as to his computation of the gross amount of wagers reflected in the records found in the room. The hypothetical questions asked assumed that the wagering operation was a co-partnership otherwise their answers simply represented a computation of the amount of wagers from records in evidence. The court carefully instructed the jury that it was not to take for granted that the statements contained in he hypothetical questions are true but should carefully scrutinize the evidence to so determine and give no weight to opinions based on any material statement found not to be true. The court did not err in the admission of this testimony.

Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible. And there is no merit to the contention that defendants' privilege against

self-incrimination was violated by the admission of such testimony.

The joint motion of certain of the defendants to quash the search warrant and suppress evidence was properly overruled. An examination of the face of the warrant shows that it is completely adequate and states sufficient grounds for its issuance. And, contrary to defendants' contentions, the items seized at the time of the search and later admitted in evidence were all instrumentalities of the crime. The betting slips, schedules of gross amounts wagered on each game, record of accounts receivable and payable and other records were all items utilized in the continued operation of the venture and instrumentalities of the crime charged. *United States* v. *Lefkowitz*, 285 U. S. 452; *Marron* v. *United States*, 275 U. S. 192, 199; *Merritt* v. *United States*, 6 Cir., 249 F. 2d 19.

During the trial the government called over sixty witnesses in corroboration of the betting records and toll slips. Nine of these invoked the Fifth Amendment. Six of the nine had claimed the privilege before the grand jury. The error, if any, in calling such witnesses is cured by the cautionary instruction given by the District Court. *United States* v. *Magin*, 7 Cir., 280 F. 2d 74, 79.

Count V of the indictment charged a violation of 26 U. S. C. A. § 7203. The punishment imposed was within that authorized by that statute and on the record and under the circumstances here involved it was not excessive. *United States* v. *Coduto*, 7 Cir., 284 F. 2d 464, 469, cert. den., 365 U. S. 881; *United States* v. *Chicago Professional Schools, Inc., et al.*, 7 Cir., concurring opinion, April 26, 1961, ... F. 2d ..... Defendants' contention that Count V charges a violation of 26 U. S. C. A. § 7272 (which imposes "a penalty of $50") rather than of § 7203 is without substance.

Defendants assert that because of prejudicial newspaper, radio and television publicity occurring on the eve of the trial they were not afforded a trial by an impartial jury. The trial commenced on a Monday. The publicity in question occurred during the previous week-end. There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions. Although defendants contend that the pre-trial publicity was generated at least in part by the government the record does not support them in this contention in so far as any of the prejudicial material is concerned.

On the morning of the trial defendants filed a motion for an indefinite continuance followed by a motion that the case be transferred to another district, both of which were overruled. The District Court carefully interrogated each prospective juror on voir dire examination as to whether or not the newspaper articles, radio broadcasts or telecasts had come to his attention and requested the parties to submit any additional questions which either party felt should be propounded to the jurors. Defendants submitted none.

Of the twelve jurymen who tried the case, only five had heard of the case through the newspaper articles in question. Four of these could not recall what they had read in the articles. One just saw the headlines and did not recall the article itself. Each of the twelve jurors stated that he had formed no opinion as to the guilt or innocence of the defendants. None had any opinion concerning any of the facts of the case because of anything they had read or heard about it and all twelve stated that they would rely entirely upon the evidence to be heard in arriving at a verdict. Following the selection of the twelfth

juror but before the jury was accepted or sworn the court gave the defendants an unlimited number of additional peremptory challenges. Defendants declined to exercise the unlimited additional peremptory challenges offered and accepted the entire jury panel, subject to their standing objection for cause. During the voir dire examination defendants had requested that all jurors who had heard of the case through the pre-trial publicity here in question be excused for cause.

Defendants rely heavily upon *Marshall* v. *United States*, 360 U. S. 310 as sustaining their contention that they were not afforded a trial by a fair and impartial jury and that the case should be reversed and a new trial awarded. In our opinion the defendants' refusal to exercise the peremptory challenges offered them precludes any application of *Marshall*. In *Marshall* the prejudicial newspaper articles were read by jurors during the trial of the case and there was no opportunity to secure others in their place. The record in this case does not establish that it was impossible to secure jurors who had not seen or heard the publicity in question. Seven of the jurors who tried the case had not and at the time defendants refused the additional peremptory challenges and accepted the jury forty veniremen had not yet been called or interrogated on voir dire examination. In *Marshall* it was recognized that the trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles and that each case must turn on its special facts. On the record before us we find no reversible error on this issue.

We have considered all other issues raised by the defendants but find the arguments advanced in support thereof to be without merit. We have not made specific reference to many of the authorities cited and analyzed in the briefs but we have considered them and each of the

arguments advanced by defendants in support of their position on the issues and discussed those issues we deemed necessary.

We conclude that the defendants were accorded a fair and impartial trial free from reversible error. Each of the judgments of the District Court is affirmed.

AFFIRMED.

ORDER AFFIRMING JUDGMENTS.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, June 13, 1961.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

Nos. 12862 thru 12867

United States of America,
Plaintiff-Appellee,
vs.
Leo Shaffer, Philip Share, Irwin Gordon, James Tamer, Jules Horwick, Edgar M. Wyatt,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, August 2, 1961.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

Nos. 12862 thru 12867 United States of America, *Plaintiff-Appellee,* *vs.* Leo Shaffer, et al. *Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed herein on June 27, 1961, on behalf of defendants-appellants Leo Shaffer, Jules Horwick and Edgar M. Wyatt, and the petition for a rehearing filed herein on June 27, 1961, on behalf of defendants-appellants Philip Share, Irwin Gordon and James Tamer, be and the same are hereby, DENIED.

CERTIFICATE OF CLERK, U. S. C. A.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the OPINION, filed June 13, 1961; JUDGMENT, entered June 13, 1961; ORDER DENYING PETITIONS FOR REHEARING, entered August 2, 1961.

Cause No. 12862 thru 67

United States of America,

vs.

Leo Shaffer, *et al.*,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of August, A. D. 1961.

/S/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT
FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 13, 1961.

OPINION BELOW.

The opinion of the Court of Appeals (infra, p. 23) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 13, 1961 (infra, p. 34). Motion for rehearing was denied on August 2, 1961 (infra, p. 35). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

1. Whether failure to file wagering excise tax returns and pay the tax, due subsequent to arrest, may constitute the gravamen of criminal charges, where to file such returns and pay such tax would incriminate the defendants of pending charges of failing to register for the wagering business and pay the occupational tax.

2. Whether petitioners were denied a fair trial by being tried by jurors who had been exposed to prejudicial publicity as to previous felony convictions, and other criminal and prejudicial activity of the petitioners.

3. Whether it was prejudicial error for the instructions to fail to require a finding that employees of a wagering business, who were not themselves liable to pay the federal wagering taxes, knew that their employers were evading such taxes, and whether the evidence was sufficient to show such knowledge.

4. Whether bank account records and records of accounts may be seized as instrumentalities of the crimes of failing to register, to pay the federal wagering occupational tax, and to pay the wagering excise tax.

5. Whether petitioners, convicted of wilfully failing to register with the District Director of Internal Revenue (punishable by a maximum $50 fine under Section 7272 of the 1954 Internal Revenue Code), may be sentenced instead for wilfully failing to file a return (punishable by a maximum of one year's imprisonment and a $10,000 fine under Section 7203 of the Internal Revenue Code).

STATUTES INVOLVED.

Section 7203, Internal Revenue Code, 1954:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (**other than a return required under authority of section 6015 or section 6016**), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7272, Internal Revenue Code, 1954:

"In general.—any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

STATEMENT.

Petitioners and all co-defendants were convicted on all five counts of an indictment. Count I charged that defendants, engaged in the business of accepting wagers as co-partners in a wagering syndicate at Terre Haute, Indiana, conspired to wilfully attempt to evade a large part of the excise tax on wagers due and owing by said syndicate for the months of September, October and November, 1957. Count II charged that defendants, as co-partners of a wagering syndicate, did wilfully attempt to evade the excise tax due and owing by said syndicate on wagers accepted in September, 1957. Counts III and IV contained a similar charge for October and November, 1957. Count V charged that defendants, as co-partners of a wagering syndicate, wilfully failed to register with the District Director of Internal Revenue (D. A. 18-29).[1] Each defend-

[1] The record will be referred to as Defendants' Appendix and Government Appendix.